IN THE MATTER OF
the Utilities Commission Act
S.B.C. 1980, c. 60, as amended

and

IN THE MATTER OF
an Application by
West Kootenay Power Ltd.

DECISION

December 18, 1991

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IN THE MATTER OF
the Utilities Commission Act
S.B.C. 1980, c. 60, as amended

and

IN THE MATTER OF
an Application by
West Kootenay Power Ltd.

DECISION

December 18, 1991

BEFORE:

J.D.V. Newlands, Deputy Chairman
and Chairman of the Division
N. Martin, Commissioner
K.L. Hall, Commissioner

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92-02528/

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S.A. ASH R.G. SIDDALL	West Kootenay Power Ltd.
D. SCARLETT	Kootenay/Okanagan Electric Consumers Association
D. GEORGE	Himself
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M. MILLNE	Community Futures Greater Trail
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M. KRUYSSE	Greater Trail Economic Development Commission
A. CARREL	The Corporation of the City of Rossland

W.J. GRANT B. McKINLAY N.C.J. SMITH J.J. HAGUE	Commission Staff
ALLWEST COURT REPORTERS LTD.	Court Reporters and Hearing Officer

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* response to outstanding information request filed with the Commission on December 5, 1991.

** response to outstanding information request filed with the Commission on December 11, 1991.

1.0 INTRODUCTION

1.1 Application

West Kootenay Power Ltd. ("WKP", "the utility") filed August 6, 1991 Energy Supply Contracts pursuant to Section 85.3 of the Utilities Commission Act ("the Act"). The Long Term Firm Power Supply Agreement ("LTFPSA") and the 1999 Firm Power Supply Agreement ("1999 FPSA") are intended to replace the Consolidated Sale of Surplus Power Agreement ("CSOSPA") between WKP and Cominco Ltd. ("Cominco"). This latter agreement, dated January 31, 1989, incorporates into one document all the amendments to the Sale of Surplus Power Agreement ("SOSPA") signed November 21, 1980. The most significant amendments to the original Agreement were required by the Sale of Surplus Power Service and Exemption Order issued July 28, 1982 by the Minister of Energy, Mines and Petroleum Resources, pursuant to Section 27 of the Act (Exhibit 3, Tab 3, page 18).

In conjunction with WKP's Application to the British Columbia Utilities Commission ("the Commission"), Cominco, by letter of August 30, 1991, requested that the Minister of Energy, Mines and Petroleum Resources amend or replace the Exemption Order to reflect the implementation of both agreements and the termination of CSOSPA. The letter stated that "The two new agreements are significantly different from the current CSOSPA agreement. They require and are contingent upon receiving your approval, Utilities Commission approval, and Cominco receiving an exemption from Part 3 of the Utilities Commission Act all prior to October 1, 1991." This deadline was subsequently postponed to January 1, 1992.

The Application by WKP was set down for public hearing on October 29, 1991 in Rossland, British Columbia by Commission Order No. G-91-91. The hearing of evidence was adjourned to November 25, 1991 by Order No. G-105-91 at the request of the intervenors. The hearing required four days and was concluded in Rossland on November 28, 1991 with argument to be submitted later with regard to certain provisions of the Agreements and Section 85.3 of the Act.

Under that section of the Act the Commission's jurisdiction is restricted to a consideration of whether the Energy Supply Contract is **not** in the public interest. If the Commission finds that the Energy Supply Contract, or any provision in it, is not in the public interest it has jurisdiction to make various orders as described in Section 85.3(2) and (3). If the Commission determines that there is nothing in the Energy Supply Contract which is contrary to the public interest, it has no jurisdiction to proceed further.

1.2 Participants

The participants included individuals representing the WKP service area Municipalities, Consumer and Community Groups, or themselves. Representatives of Cominco Ltd. also attended, with Mr. Kim Deane, Manager, Energy and Utilities at Trail appearing as a witness for Cominco. A number of persons gave presentations in support of the new Agreements, including Mayor Santori speaking for Trail, Maureen Millne speaking for the Community Futures Greater Trail area, Terry Campeau, a businessman from Trail, Doug Swanson, head of the Steelworkers Local 480 and Chairman of the Regional District of Kootenay Boundary, Mark Marcolin, formerly Mayor of Trail, Senior Vice-President of Cominco at Trail, and Chairman of the Trail Economic Development Commission, Bill Trewhilla, Mayor of Warfield, Don Vockeroth, Chairman of the Rossland Chamber of Commerce, Martin Kruysse, speaking for the Greater Trail Economic Development Commission, and André Carrel, speaking for the Mayor and Council of the City of Rossland.

2.0 FACILITIES

2.1 Hydroelectric Plants

WKP began the development of hydroelectric energy in the West Kootenay area with the construction of a dam and generating facilities at Lower Bonnington ("Plant No. 1") on the Kootenay River in 1898. Other dams and plants were built on the river at Upper Bonnington ("Plant No. 2") in 1907, South Slocan ("Plant No. 3") in 1929 and Corra Linn ("Plant No. 4") in 1932. The No. 1 plant at Lower Bonnington was reconstructed in 1928.

Cominco constructed its own hydroelectric plant on the Kootenay River at Brilliant in 1944 and at Waneta on the Pend d'Oreille River in 1954. British Columbia Hydro and Power Authority ("B.C. Hydro") owns the Canal Plant on the Kootenay River, and a plant at Seven Mile on the Pend d'Oreille River (1982 Commission Decision).

The four WKP plants on the Kootenay River have a total installed capacity of some 190 megawatts ("MW"). In 1991 WKP had an estimated average load of 435 MW, with a peak demand of 579 MW. WKP's own resources can, therefore, supply only about 30 percent of their peak demand. In terms of gigawatt hours ("GW.h") of energy, these resources can supply about 50 percent of their estimated annual requirement of 2775 GW.h (Exhibit 19).

The following table summarizes the existing capacity of the seven dams:

Location	Owner	Peak Capacity
Kootenay River		
- Plants No. 1, 2, 3, 4	WKP	190 MW
- Canal Plant	B.C. Hydro	530 MW
- Brilliant	Cominco	125 MW
Pend d'Oreille River		
- Waneta	Cominco	375 MW
- 7-Mile	B.C. Hydro	600 MW

It is worth noting that the combined capacity of these plants, other than WKP, is nearly twice that of the 900 MW Site C plant proposed by B.C. Hydro for the Peace River.

In addition to the facilities actually in place, an opportunity exists to construct additional generating facilities at both the Brilliant and Waneta dam sites. The economics of these generating sites are a function of the actual capital and operating costs and what, if any, compensation Cominco requires or is entitled to as a result of the existing structures. In addition, the Columbia River Treaty affects potential expansion as it has provided more usable streamflows through coordinated regulation of storage releases, thus providing for a higher output from these projects than would be possible without the Treaty. Who should construct these facilities—Cominco, West Kootenay, B.C. Hydro or a combination thereof, requires resolution (T. 133).

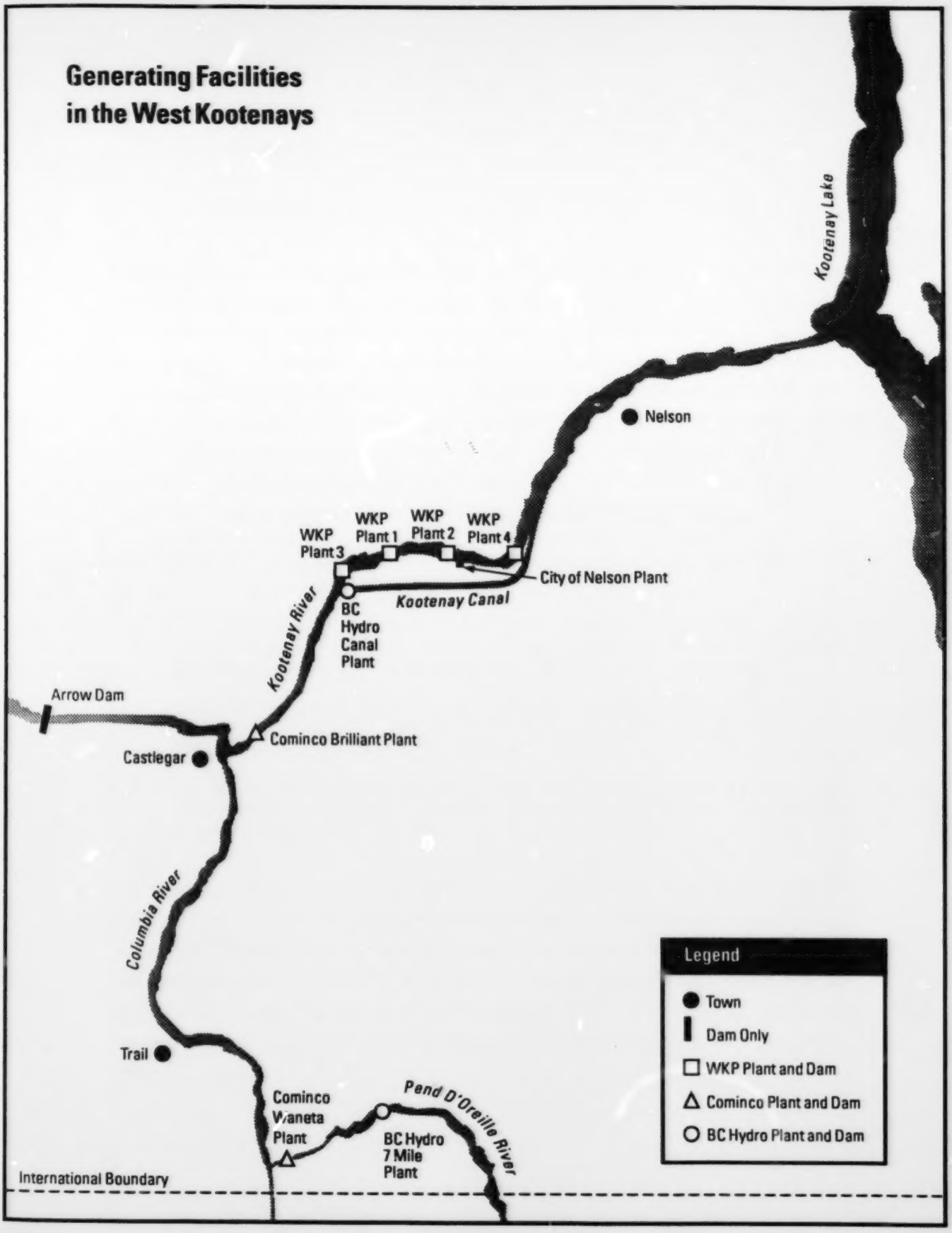
2.2 Canal Plant Agreement

Under the Canal Plant Agreement entered into in August 1972, B.C. Hydro gave average peak and average energy assurances to Cominco and WKP to the year 2005 as an entitlement in exchange for water rights on the Kootenay River. This Agreement integrates the Cominco and WKP facilities with the B.C. Hydro grid. In 1974, in order to optimize the total generating capacity of the Kootenay River system, B.C. Hydro constructed a canal by-passing the four WKP generating plants, and installed the Canal Plant, a 530 MW facility, with its outlet downstream of the WKP No. 4 Plant.

To provide maximum efficiency in the use of the water resource at the Canal Plant, effective control of Kootenay River water flow rests with B.C. Hydro and the power available to Cominco and WKP is no longer relative to the actual production of their respective power plants. WKP personnel control the Corra Linn dam from the Warfield Control centre but essentially B.C. Hydro determines the actual generation at the plants. The Canal Plant Sub-Agreement, executed in 1981 between Cominco and WKP, provides that each of these companies receive specified annual capacity and energy entitlements based on the historic average generation of the WKP and Cominco plants.

This results in reduced operating levels at the WKP plants and extends the useful lives of the running gear in the plants, which must at all times be maintained in good working order under the Agreement.

Location of the hydroelectric generating facilities in the West Kootenays are shown in the attached diagram.


Generating Facilities
in the West Kootenays
Kootenay Lake
Nelson
WKP Plant 3
WKP Plant 1
WKP Plant 2
WKP Plant 4
City of Nelson Plant
Kootenay Canal
BC Hydro Canal Plant
Kootenay River
Arrow Dam
Cominco Brilliant Plant
Castlegar
Columbia River
Trail
Cominco Waneta Plant
Pend D'Oreille River
BC Hydro 7 Mile Plant
International Boundary
Legend
Town
Dam Only
WKP Plant and Dam
Cominco Plant and Dam
BC Hydro Plant and Dam

3.0 AGREEMENTS

3.1 Sale of Surplus Power Agreement

The Sale of Surplus Power Agreement signed November 21, 1980 provided WKP with first right of purchase on Cominco's surplus electric power at a low rate. The utility's generating capacity was insufficient to meet its load and WKP's testimony at a public hearing in 1981 was that this was by far the cheapest power of the available alternatives. At that time, WKP had exclusive use of, and exclusive right to, the electricity from Plants No. 2, 3, and 4 under a "Plant Use Agreement" also signed November 20, 1980. The 1980 SOSPA specified that Cominco must first offer for sale to WKP for use by WKP for resale within the WKP service area, electric power from Cominco's Brilliant and Waneta plants that is surplus to Cominco's load requirements, under certain conditions, as follows:

1. Under no circumstances will Cominco be required to sell an amount of power which would result in its facilities being regulated as a utility.

2. To facilitate the allocation of surplus power, Cominco shall notify WKP by June 30 in each year of the amount of surplus power it estimates it will have available to WKP in each of the following 15 months.

3. The price will be 6.227 mills per kW.h, being the effective composite rate for supply to WKP in 1979 from Plants No. 2, 3, 4, 5 and 6. The composite rate includes a charge for capacity and energy.

4. The rate of 6.227 mills per kW.h is to be increased or decreased to the extent that Cominco's annual average cost of producing power from Brilliant and Waneta is greater or less than it was in 1979.

The Agreement ran to September 30, 2005 but was to terminate if any body exercised any right of taking under statutory authority any of the shares of WKP's capital stock or any part of WKP's hydroelectric power plants or any material part of the distribution system. The Agreement also terminated if any body exercised any right to compel either party to supply power to any persons, except in the case of WKP, in the ordinary course of business as a utility, or if Cominco's electric power facilities became regulated as a public utility.

3.2 Sale of Surplus Power Service and Exemption Order

In 1981 WKP applied to the Commission for a Certificate of Public Convenience and Necessity ("CPCN") to purchase Plants No. 2, 3 and 4 from Cominco. At the same time Cominco applied to the Commission for an Order exempting it as a public utility under Section 103(3) of the Act. Public hearings on the Applications followed in August, September and October, 1981. On April 2, 1982, the Commission issued a Decision which stated that, with the approval of the Lieutenant Governor in Council, it would grant Cominco an exemption and issue WKP a CPCN on conditions which would accomplish the following objectives:

1. That the sale of Plants No. 2, 3 and 4 and associated facilities to WKP should be approved.

2. That electric power from Cominco's Plants No. 5 and 6 which is surplus to Cominco's industrial requirement, now and in the future, should pass on a staged basis to WKP.

3. That WKP should have the opportunity to expand the generation capability at Brilliant and Waneta from time to time to meet its increasing load requirements.

4. That Cominco should be granted exemption from the provisions of the Act excepting Part 2, and Sections 47 (limited to apply to Plants No. 5 and 6), 51 and 133 (limited to these proceedings).

The Lieutenant Governor in Council was unwilling to approve the exemption on the terms and conditions described by the Commission due to changed circumstances. By Order dated July 28, 1982 pursuant to Section 27 of the Act, the Minister of Energy, Mines and Petroleum Resources exempted Cominco from the provisions of Part 3 of the Act with the exception of Sections 47, 51 and 53 and authorized it to sell its surplus power service subject to certain conditions, including the transfer of ownership of Plants No. 2, 3, and 4 and all related facilities and licences to West Kootenay for a purchase price of $20,000,000.

The Order directed Cominco to file with the Minister its undertaking to support any application made by WKP for approval to expand the generating capacity at Brilliant and/or Waneta, for the purpose of increasing the power supply to WKP and to provide reasonable assistance for any such application.

Another condition of the Order was that the 1980 Sale of Surplus Power Agreement be amended providing for:

1. Cominco to make available for sale to WKP, up to December 31, 1990, firm energy totalling up to 75 average annual megawatts ("aaMW") on a calendar year basis.

2. Cominco to grant a right of first refusal to WKP of any further surplus.

3. A procedure whereby Cominco and WKP will contract in five year intervals for the sale and purchase of interruptible power during the period from January 1, 1991 to September 30, 2005.

4. The price for power to be as set out in the November 1980 SOSPA, with a mechanism to adjust the price for reasonable actual contribution to replacement of capital costs.

5. A force majeure proviso.

6. Cominco to grant right of first refusal in favour of WKP to acquire Brilliant and/or Waneta, together with any associated facilities until September 30, 2005.

7. Cominco to make agreements with WKP for the common use of transmission and switching facilities so that each can be operated together as one integrated system.

3.3 Consolidated Sale of Surplus Power Agreement

The Sale of Surplus Power Agreement was amended October 20, 1982 to comply with the conditions in the Government's Exemption Order and was approved by Commission Order No. G-86-82. The Agreement was amended in later years to comply with Exemption Order Amendments in establishing a fixed allowance for spillage and to enable Cominco to supply a maximum of 25 aaMW to operate an Oxygen Plant located on the Trail plant site.

After WKP and B.C. Hydro entered into a power purchase agreement which provided that WKP must make binding nominations to B.C. Hydro on a two-year rolling basis until 1989 and on a ten-year rolling basis thereafter, Cominco agreed to further amend SOSPA to make available for sale to WKP a portion of its surplus energy as firm energy on a two-year rolling basis until 1990 and on a five-year rolling basis thereafter until 2005.

On January 31, 1989, the parties signed a Consolidated Sale of Surplus Power Agreement which incorporates into one document all of the amendments and recognizes the transfer of facilities and other changes that have occurred since 1980.

3.4 Long Term Firm Power Supply Agreement

The Long Term Firm Power Supply Agreement, as amended, terminates and replaces the Consolidated Sale of Surplus Power Agreement between Cominco and West Kootenay dated January 31, 1989. It provides for the purchase by West Kootenay from Cominco of 75 aaMW, on a firm basis, until September 30, 2005. WKP is entitled to utilize on an hourly basis, any unused Cominco capacity, at no cost. WKP is to pay for the firm energy and firm capacity made available, whether or not taken, less any reductions due to routine and annual plant maintenance, forced outages or entitlements under the Canal Plant Agreement.

The first component of the price payable for the power is based on Cominco's annual costs of producing the power plus amounts for recovery of capital expenditures subsequent to 1982. The second component is 4.293 mills per kW.h for 1991, 4.4 mills per kW.h for 1992 and thereafter is adjusted for changes to the Consumer Price Index for Vancouver. By separate agreement (Exhibit 30), WKP agreed that if government or B.C. Hydro reduces costs intended for Cominco or industry but not specifically intended to reduce the cost of power sales to WKP, then WKP will not oppose a recalculation of the LTFSPA price such that the benefit of the preferred treatment accrues first to Cominco.

The Agreement makes provision for termination if any body exercises any right of taking under statutory authority any of the shares of WKP's capital stock or any part of WKP's or Cominco's hydro-electric power plants or any material part of the distribution systems. The Agreement also terminates if any body exercises any right to compel either party to supply power to any persons other than pursuant to an Order of the Minister of Energy, Mines and Petroleum Resources dated prior to January 1, 1992 or if Cominco's electric power facilities become regulated as a public utility.

Schedule 3 of the Agreement provides conditions precedent as follows:

> Cominco and West Kootenay are not bound by this Agreement and it is void unless prior to January 1, 1992
>
> (1) the B.C. Utilities Commission
>
> (a) declares that this entire Agreement, without modification, is in the public interest and is enforceable, and
>
> (b) declares that the entire 1999 Firm Power Supply Agreement between Cominco and West Kootenay, without modification, is in the public interest and is enforceable, and
>
> (c) does not make an order which adversely affects the rights and obligations of either party arising out of this Agreement or the 1999 Firm Power Supply Agreement; and
>
> (2) the Minister of Energy, Mines and Petroleum Resources grants Cominco an exemption from Part 3 of the Utilities Commission Act on terms and conditions acceptable to Cominco.

3.5 1999 Firm Power Supply Agreement

This Agreement provides for the purchase by West Kootenay from Cominco of 38 aaMW, on a firm basis, until December 31, 1999. WKP is to pay for the firm energy and firm capacity made available, whether or not taken, less any reductions due to forced outages. If there are such forced outages, Cominco shall divert to WKP one third of any interruptible sales of power to the market in the amounts necessary to make up in whole or in part, the reduction.

The first component of the price payable for the power is 19.5 mills per kW.h in 1992, escalating to 30 mills per kW.h in 1999. The second component is based on Cominco's annual water licence rentals for energy (3.991 mills per kW.h in 1991) and water fees for capacity. In addition, the Agreement provides that the price shall be adjusted to reflect increased costs attributable to changes in legislation which impose taxes, rentals or fees applied to generation.

The Agreement makes the same provisions for termination and conditions precedent as are contained in the LTFPSA.

4.0 THE PARTIES

4.1 West Kootenay Power Ltd.

WKP was incorporated in British Columbia by provincial statute in 1897. Also incorporated in 1897 were three wholly-owned subsidiaries: Cascade Water Power and Light Co. Ltd., Okanagan Water-Power Co. and South Kootenay Water-Power Co. Ltd. WKP provides electric utility service in the West Kootenay/Boundary region of British Columbia and in the Southern Okanagan. The system supplies approximately 68,000 direct-service customers and about 40,000 other customers indirectly through municipal utilities in Nelson, Grand Forks, Kelowna, Penticton and the District of Summerland, and to a privately-owned utility supplying the Princeton area (Exhibit 19). In 1987, WKP became a wholly-owned subsidiary of UtiliCorp British Columbia Ltd., which is in turn a wholly-owned subsidiary of UtiliCorp Inc. of Kansas City, Missouri.

4.2 Cominco Ltd.

Cominco was incorporated as a Federal company in 1906 under the name of The Canadian Consolidated Mines Limited. Shortly after, the name was changed to The Consolidated Mining and Smelting Company of Canada Limited and, in 1966, to Cominco Ltd. From its inception, until 1988, the Company was controlled by the Canadian Pacific Ltd., or affiliated companies. It is now controlled by an international consortium of companies, including Teck Corp., M.I.M. (Canada) Inc. and Metall Mining Corp.

In British Columbia, Cominco is engaged primarily in mining, metallurgical and fertilizer operations. Lead smelting was introduced in the Trail area in 1899 and an electrolytic zinc plant was built in 1916. Fertilizer production commenced in 1931. Copper mining commenced in the Trail area in 1890, lead-zinc at Moyie Lake in 1892 and Cominco's major mine, the Sullivan lead-zinc mine at Kimberley, in 1910.

At present, the Trail smelter treats concentrates not only from local mines in the Kootenay area but also from other sources, principally the Red Dog Mine in Alaska. The viability of the smelter is dependent to a large degree on the availability of ample supplies of low-cost hydroelectric power.

Cominco's operations in the East and West Kootenay areas form an important part of the economic base of the regions. Currently, the Company employs some 3,700 people in these areas. During the last four years Cominco has invested some $350 million in new plant (T. 447) mostly in connection with a new lead smelter, with the possibility of some further expansion in the future.

5.0 THE ISSUES

The major issues addressed at the hearing were the need for WKP to acquire a secure supply of power through to 2005 at fair rates, and whether the Agreements provide an appropriate sharing of benefits. Alternative scenarios were examined, the most important being the provision of backup supply.

Among utilities, WKP is in a unique position of risk in regard to access to energy supplies. The 1990 Annual Report of the Company (Exhibit 19) reports the following figures under the section titled Resource:

Energy Sources:		
WKP owned generation	1,485 Gw.h	54 percent
Purchased from Cominco	1,079 Gw.h	40 percent
Purchased from B.C. Hydro	157 Gw.h	6 percent
Energy Capacity Purchases:		
All time peak load, December 29, 1990	623 MW	
WKP owned generation	195 MW	31 percent
Cominco	263 MW	42 percent
B.C. Hydro	165 MW	27 percent

It is obvious that for many years WKP's own generating capacity has been insufficient to meet its utility load. As previously noted, the provision of firm supply by CSOSPA ended in December 1990. In the face of the resulting uncertainty, WKP negotiated the two new Agreements to replace CSOSPA and firm-up a source of energy supply for a period to assist the Company in its long-term resource planning (Exhibit 2, Tab 2, Page 1 and T. 11).

5.1 Security of Supply

Mr. Macintosh summarized WKP's position at T. 572 as follows:

> "The sale of surplus power agreement and the consolidated agreement provided cheap power to West Kootenay, but they did not do so on a firm basis after 1990 except on the limited and qualified terms of the five-year rolling nominations as summarized in Exhibit 2, Tab 1, page 1. In the

> result West Kootenay could not depend upon cheap Cominco power without back-up and was forced to nominate the more expensive power from B.C. Hydro based on its best guess of Cominco's needs for its own industrial loads."

Mr. C.B. Johnson, representing Cominco, stated in argument:

> "A public utility that provides service to residential and commercial customers, such as West Kootenay, must provide firm service and have available firm resources to meet the requirements of its customers. Firm resources should be available for the long term." (T. 595)

There was unanimous support for the underlying principle that a public utility must develop or acquire adequate resources to accommodate the demand placed on its system.

Mr. R.B. Wallace, representing the City of Kelowna, District of Summerland, City of Penticton, City of Grand Forks and City of Nelson ("the Municipalities"), stated:

> "I'd like to make it clear that the municipalities are not taking part in these proceedings as an adverse party in the normal sense. We believe that West Kootenay's interests and its customers' interests on matters of this nature should essentially be the same." (T. 619)

Ms. J. Vance, acting on behalf of a number of consumer organizations (CAC et al), added:

> ". . . clearly it is in the public interest to bring greater certainty in the availability of West Kootenay Power's base supply of electricity by securing Cominco power." (T. 645)

Mr. D. Scarlett, speaking for the Kootenay Okanagan Electric Consumers Association, said in argument:

> "In transcript page 270, I stated that we were very favourable to the concept of firm power contracts between West Kootenay Power and its suppliers of energy. Indeed, the Kootenay Okanagan Electric Consumers Association is in favour of West Kootenay Power reducing its risk, and certainly in favour of West Kootenay Power reducing customer costs by contracting for firm power resources." (T. 678/9)

5.2 Price and Cost of Power

Long Term Firm Power Supply Agreement Price

The price formula in this contract, as set out in Exhibit 2 at Tab 4, Schedule 1, is identical to the CSOSPA except that the "Second Component" will increase from 4.293 mills per kW.h to 4.400 mills per kilowatt hour in 1992 and will be increased by changes in the Consumer Price Index in each subsequent year. The addition of this inflation factor to the fixed component in the price formula results in an increase of 1 mill in the levelized unit cost of this contract, from 13.1 mills per kW.h to 14.1 mills per kW.h. The present value of this increase, at an 8 percent real discount rate, is $4.4 million.

1999 Firm Power Supply Agreement Price

The similarity in the pricing formula of this contract with the new "Long Term Firm Power Supply Agreement" is that both contracts bundle energy and capacity into one price per kW.h and both have two components, escalating over time as outlined in Section 3.5 of this Decision. The levelized cost of this contract is 29.64 mills per kW.h (Exhibit 34C).

5.2.1 Price of Firm Power

Mr. Wallace felt that the new accelerator on return is not warranted (T. 628) and found it very hard to see why the return on capital should increase with inflation. He felt the Commission should review the prices and decide whether they are appropriate in all the circumstances (T. 641)

The CAC et al submitted that the price that WKP has agreed to pay, when compared to the components from which it derives its value, is too high (T. 658). At T. 654, Ms. Vance argued:

> "Now at page 75 Mr. Ash stated that once the 1999 contract got out to the final year upper limit, the 36 mill price was referenced to West Kootenay Power's projection of what the Hydro costs or alternate costs would be and thus Cominco is receiving the benefits of a price charged by a utility and is

> using that bench mark to establish its price and yet it is not subject to all of the costs and the responsibilities and obligations of a utility. It's taking the benefit without the obligations."

The argument suggests that the escalation rate is set based upon the comparable price for B.C. Hydro first block power in 1999. And, in fact, Exhibit 34C showed the levelized unit costs of the B.C. Hydro first block are 31.25 mills per kW.h, being a difference of only 1.6 mills or roughly 5 percent

It is equally possible that the net benefit to Cominco of wheeling a similar amount of power as under the 1999 Firm Power Supply Agreement to its joint venture in Highland Valley Copper could have been the determining factor in setting the price for power under this agreement. WKP identified the savings in energy cost to Cominco at T. 157 Mr. Ash stated:

> "Cominco advised us of their intention to wheel some of their present energy that they supply West Kootenay to Highland Valley Copper. They believed that they were entitled to do this under the terms of CSOSPA and were in the process of making arrangements with B.C. Hydro to negotiate a wheeling rate that would permit them to do this. If they had achieved that they were intending to wheel a block of energy to Highland Valley Copper which would mean that they would reduce their required purchased from B.C. Hydro and replace it with their own energy at considerable savings, which I believe were in the order of $6 million a year."

A $6 million saving each year for the eight years of the term of the 1999 Firm Power Supply Agreement yields a present value of $34 million with an 8 percent real discount rate. Using the difference in levelized costs in Exhibit 34C between the 1999 Firm Power Supply Agreement and the Long Term Firm Power Supply Agreement, the difference in present value cost for the amount of power in question is $42 million, an additional $8 million benefit to Cominco. As well, Cominco does not need to pay the wheeling costs to transmit its power to Highland Valley Copper as this power was sold to WKP.

At T. 308 Mr. Ash outlined WKP's bargaining rationale:

> ". . . Right at the very beginning we had a series of meetings to try and see how we could get ourselves out from underneath a difficult series of litigations that we seemed to be headed towards and West Kootenay, we

> internally had a brain-storming session to see if there was some way in which we could come to some resolution. We looked to the benchmark at the cost of, or the benefit to Cominco of the wheeling to Highland Valley Copper and we determined what it would be necessary to pay to Cominco to make them think otherwise than wheeling to Highland Valley Copper."

The Commission believes that WKP says here that the price of avoiding litigation, which it believes it has a good chance of winning, is at least $8 million.

Elsewhere in the transcript WKP argues that both the new Cominco contracts must be considered together (T. 79). In other words, the continuation of the low price under the Long Term Firm Power Supply Agreement is paid for in part by a higher price in the 1999 Firm Power Supply Agreement.

Both Mr. Wallace and Ms. Vance argued that the price of the first block of energy is low for historical reasons and doesn't have to be bolstered or compensated by the second block being set at a higher price than deserved (T. 654).

5.2.2 Cost of Firm Power to 2005

Sensitivity Analysis - Winning Litigation: Cominco Load Growth

WKP set out a financial analysis of net present values of power purchase costs, using an 8 percent real discount rate (Exhibit 2, Tab 1, page 4). The analysis compares costs of purchased power under the new Cominco contracts with CSOSPA under a range of Cominco load growth scenarios, assuming both winning and losing the possible litigation with Cominco regarding its right to wheel surplus power to Highland Valley Copper. In all cases, the existing rate for purchases from B.C. Hydro was assumed. The new contracts produced the lowest cost in all cases, except where WKP wins the litigation and Cominco experiences zero load growth.

This latter scenario, if assigned an 80 percent probability of winning the litigation (based on testimony at T. 251), compares the cost of the "status quo", that is CSOSPA coupled with zero Cominco load growth, to the cost of the new Cominco contracts. The new Cominco contracts, at $271 million present value cost, are $16 million present value more than the "status quo" with a present value cost of $255 million.

If, however, the Cominco load does grow moderately (still assuming an 80 percent probability of winning the litigation), the new Cominco contracts indicate a present value cost of $265 million, whereas the existing contracts indicate a present value of costs of $282 million. That is, the new Cominco contracts would cost $17 million less than CSOSPA. The uncertainty with regard to Cominco load growth, as portrayed by WKP, is of such a magnitude as to completely reverse the financial argument. The swing in the present values totals $33 million or about 13 percent of the present value of the power purchase cost under the "status quo".

Examining the lowest cost purchase scenarios year by year, it becomes apparent that the proposed expansion of the Cominco zinc plant in 1997 is a key event as a large amount of low cost power under CSOSPA would then no longer be available to WKP. WKP was asked to determine what Cominco would require in order to defer its zinc expansion until the year 2000. At T. 372, Mr. Siddall responded:

> "I asked Cominco last night what they would charge given a continuation of the current contract to defer zinc from 1997 to the year 2000 and they indicated it would be about $100 million."

The "price" of this specific assurance clearly overwhelms the savings that could accrue.

5.2.3 Cost of Firm Power with New B.C. Hydro Rates

The analysis comparing old and new agreements is further complicated by the fact that B.C. Hydro and WKP have agreed in principle to a new power purchase contract containing new rates and a significantly modified rate design. That contract will be a subject of the B.C. Hydro rate design hearing scheduled to re-convene before the Commission on January 13, 1992.

WKP provided an expanded analysis of its forecast of power purchase costs in Exhibit 3, Tab 2, page 3, showing the impact of the new B.C. Hydro rates upon the cost effectiveness of the new Cominco contracts. In the preparation of this analysis WKP considered month to month changes in its needs for purchased power. In an attempt to isolate the B.C. Hydro rate variable, WKP prepared Exhibit 40, wherein it assigned an 80 percent probability to Cominco expanding zinc production in 1997 and an 80 percent probability of winning the Highland Valley Copper litigation. The results of those analyses can be summarized in the following way:

Existing 3807 B.C. Hydro Rates:	
Scenario "2B & 3B" -	
Old Cominco Contract - CSOSPA	
80% probability of winning litigation	
80% probability of Zinc Expansion in 1997	
Present Value Costs of Purchased Power:	$297 million
Scenario "1A" -	
New Cominco Agreements	
Zinc Expansion in the year 2000	
Present Value Costs of Purchased Power:	$283 million
Saving in present value at 8%	$14 million
With the new proposed B.C. Hydro Rates:	
Scenario "2D & 3D" -	
Old Cominco Contract - CSOSPA	
80% probability of winning litigation	
80% probability of Zinc Expansion in 1997	
Present Value Costs of Purchased Power:	$324 million
Scenario "1C" -	
New Cominco Contracts	
Zinc Expansion in the year 2000	
Present Value Costs of Purchased Power:	$289 million
Saving in present value at 8%	$35 million

With this type of uncertainty, theoretically one would have great difficulty determining whether the new or old contracts should prevail. However, as Mr. Macintosh warns the Commission at T. 577:

> "I would ask the Commission to keep in mind that if the two agreements were not approved because there was concern about the certainty of the Cominco load forecasts, West Kootenay customers would lose $26 million

> over the next 14 years if those forecasts turned out to be correct or turned out to be low. In other words it could not in this care be regarded as a counsel of prudence to not approve the agreements just because future forecasts necessarily have a degree of uncertainty associated with them."

The decision should be made on the basis of the current B.C. Hydro rates, but the Commission recognizes that the new B.C. Hydro rates appear to magnify rather than reduce the financial advantage of the new Cominco agreements.

5.3 Back-up Supply under CSOSPA

As identified in the previous section, the advantage of the new Cominco agreements over CSOSPA, assuming a continuation of the existing B.C. Hydro rates, is estimated by WKP to be $14 million in present value terms at an 8 percent discount rate. A crucial assumption supporting this estimate is the cost of backing up the Cominco non-firm supply under CSOSPA.

WKP provides a detailed analysis of this assumption in Exhibit 3, Tab 1, page 10. That evidence estimates the cost of back-up, under the CSOSPA scenarios, and with the old B.C. Hydro rates, at a present value cost of $22 million. WKP characterized the estimate as both conservative and a proxy representing the back-up charge. If the back-up could be achieved at a cost of $8 million, continuation of CSOSPA would be financially equivalent to the new Cominco contracts.

WKP testified (T. 190) that it extensively canvassed other utilities in the region, including those in Alberta and the Northwest U.S.A., for a back-up supply but no opportunities were forthcoming. Mr. Siddall stated:

> "We have looked at the back-up options primarily related to the gas turbine. We looked at attempting to get back-up from B.C.or Alberta or the Pacific Northwest, and we were unable to find anything that was competitive with the gas turbine, and hence we were using the gas turbine as we've indicated earlier, as the proxy for the back-up cost."

WKP also testified that, in spite of three letters to B.C. Hydro requesting an offer of back-up, the letters (Exhibits 20 and 41) went unanswered. However, since the time WKP canvassed B.C. Hydro for back-up it has signed "Principles of Agreement" (Exhibit 16) with B.C. Hydro for a long-term supply of energy and capacity (T. 437). The rates under that agreement are very similar in concept to the Industrial Rate Proposal in B.C. Hydro's Rate Design Application before the Commission (T. 438). That Industrial Rate Proposal also contains proposed tariff schedules for short term Stand-by and longer term Back-up service as set out in Exhibit 32. The rates charged for these services as proposed would be determined by negotiation subject to approval by the Commission.

At T. 63, WKP explains how the concept of "single utility" as contained in its Principles of Agreement with B.C. Hydro might work in the context of back-up requirements. Mr. Siddall stated:

> "I think getting back to the original concept of a single utility you'd be looking at B.C. as a whole, you'd be looking at the non-firm portion of Cominco, you would then look at that volume and you would look at the probabilities of being able to get that power either out of storage reservoirs with some probability of refill, or in the event that it wasn't available there then the probability of obtaining it out of Burrard, and to the extent that the load resource balance was able to meet that on a firm basis or a very high-probability basis, you might be able to do that, but as the probabilities of being able to meet the load dropped I'd suggest the back-up charge would increase. If you have a large forecast surplus then, yes, it would equate directly to export prices."

The reference to export prices relates to B.C. Hydro's Application for an Energy Removal Certificate ("ERC") for Electricity Exports to the United States and Alberta that has been referred to the Commission by the Minister of Energy, Mines and Petroleum Resources. One of the Terms of Reference is that the reliability and security of electricity supply to British Columbians will not be adversely affected by the proposed removals. In addition, electricity proposed for short term removal by the Authority must first be offered to domestic interconnected utilities on terms and conditions no less favourable than the proposed exports. WKP has an obvious need for approximately 1,000 GW.h of back-up per year. This represents about 20 percent of the firm annual output of B.C. Hydro's Burrard plant, as identified in the Commission's April 30, 1990 B.C. Hydro Decision.

The testimony at T. 439, 488-9 indicates that WKP has not been sufficiently aggressive in its pursuit of back-up supply from B.C. Hydro. The need for B.C. Hydro to offer this supply in the context of its application for an ERC, may be fulfilled too late to alter the course of this decision with regard to the cost effectiveness of the new Cominco contracts.

There was a great deal of cross-examination on the probable use of all surplus power by Cominco for its industrial load, including the assertion that it would begin to play "hardball" with WKP. However, without a mandated firm supply as previously required under CSOSPA by the Exemption Order, adequate, reliable back-up of the Cominco surplus is necessary. The evidence showed that WKP had not sufficiently pursued the back-up option but also that B.C. Hydro, the most feasible source of back-up, was unresponsive in the extreme.

5.4 Surplus Power

5.4.1 Right of First Refusal

Both SOSPA and the Exemption order require that Cominco provide a right of first refusal to WKP of any power that is in excess of its industrial load requirements. This benefit is not present in the two new Cominco/WKP Agreements.

Cominco argued its reasons for the removal of the "first right of refusal" clause at T. 609-611. Mr. Deane addressed this at pages 472 and 473 of the transcript:

> "Well, I would just like to note that rights of first refusal can at first pass be seemingly a fairly innocent and reasonable provision in a contract, but they can also be a very serious obstacle. And that's what we feel we've run up against in this circumstance, and that's why Cominco made it within these negotiations one of its priorities, even possibly at the cost of getting a higher price. We felt that provision was very important. The key thing is the freedom for Cominco to get market prices on the power made available from short-term or partial shutdowns that will occur and the agreement contemplates these and it's necessary to drive the conservation aspect. And so the agreements were made with that in mind. If necessary, it allows Cominco to re-organize or restructure. It frees us to explore every option to ensure the viability of the industrial operations is fundamentally what it provides."

Mr. Wallace stated at T. 622-623:

> "The right of first refusal has been suggested by Cominco to be something that might hinder their ability to carry on business and therefore should not be included, even in the case or the event of a disaster scenario. We respectfully submit that the right of first refusal can and should be structured to avoid that problem, as it has been done, or practically, was done in the past. In our submission the key is to see that the power generated here is used in the region, not put in a position where it might be exported in the case of shutdown of local operations."
>
> "... we will be submitting very strongly that the test should not be market prices, because of the historic relationship of the parties, that this low-cost power resource should be left to benefit the Kootenay region and if it does that in the hands of Cominco that's great and we support that but if it's simply exported we would be much more reluctant to support it."

WKP may not be able to take advantage of short-term shutdown situations at Cominco unless Cominco forecasts these well in advance. A permanent "partial shutdown" of Cominco operations could be very significant to WKP's power resource planning. The issue here is how is the public interest best served. Is the public interest best served by Cominco being in a position to mitigate its losses on account of a shutdown by selling the surplus power to the market at large, or, is it best served by reselling that power through WKP at an advantageous price to WKP's customers?

The other side of the balance concerns the surplus power arising on account of Cominco conservation that is induced by the higher price paid by WKP in the "1999 Firm Power Supply Agreement".

5.4.2 Cominco Conservation Potential ("DSM")

WKP has actively pursued the acquisition of supply through improved energy use efficiency by its customers since 1989. WKP has been encouraged in this regard in Commission Decisions since that time. For example, at page 17 of its December 20, 1990 Decision regarding WKP revenue requirements, the Commission stated:

> "The Commission explored with the Applicant, (T 1479), the potential for increasing supply from Cominco through a WKP-sponsored DSM program designed expressly for that company's industrial enterprise. The Applicant indicated that such a program has been considered and that WKP will report to the Commission on the status of that effort. WKP is directed to provide

> that report by July 1, 1991. If successful, this program would assist Cominco by lowering its costs while, at the same time, increasing the energy available to the Applicant."

Further, at pages 18 and 19 of the same Decision the Commission directed WKP in the following way:

> "The Commission directs WKP to reassess its DSM targets recognizing that now and for the foreseeable future, this resource is its least-cost, most flexible and most environmentally benign source of power. The challenge to meet both load growth and diminished supply from Cominco with the DSM resource is one that must be aggressively addressed by WKP.

One of the challenges given to WKP was an assessment of the DSM resource potential within the Cominco operations.

The significance to WKP of the conservation potential within the Cominco operations is indicated by Exhibit 33 filed by Cominco. At T. 475 Cominco explains that it is a preliminary summary of conservation potential. The conservation potential in this "preliminary" estimate is a range of 20 to 35 aaMW. At T. 476, Cominco confirmed its commitment to fund 50 percent of the cost of a $40,000 study that will be shared with WKP to more accurately define the conservation potential at Cominco's operations.

The preliminary estimates equate to a range of 175 to 306 GW.h of energy per year. By comparison, the 1999 Firm Power Supply Agreement would provide WKP with 38 aaMW of capacity and a range of 315 to 367 GW.h of energy per year.

Cominco related the magnitude of the conservation potential to the price that could be achieved from the sale of the power at T. 513. The Chairman stated:

> "But as you go down the scale presumably it becomes more costly to do each project until you reach the point where you say there's no money in it at the price I'm getting for my power, therefore I don't want to do it.

At T. 513, Mr. Deane stated:

> Exactly, Mr. Chairman. That was behind my reasoning. Thank you. This is predicated on the new agreements and driven by the market price after the 1999 termination of the 38 block, to drive it longer term."

The "1999 Firm Power Supply Agreement" and the "Long Term Firm Power Supply Agreement" are both related to the conservation potential at Cominco's operations in the following ways (T. 159):

" MR. WALLACE:	Q:	Okay. The second issue that you raised was the price signal, that Cominco has no incentive to conserve because of the low price or low value given its electricity.
MR. ASH:	A:	Yes.
MR. WALLACE:	Q:	And the argument seems to be that if West Kootenay pays more Cominco will have more incentive to conserve its power.
MR. ASH:	A:	Yes.
MR. WALLACE:	Q:	Now, even if Cominco does conserve its power there's no necessary benefit to West Kootenay arising out of that conservation, is there?
MR. ASH:	A:	That's correct.
MR. WALLACE:	Q:	And if you were to buy power arising out of that conservation you would be buying it at market price?
MR. ASH:	A:	Yes."

The 1999 Firm Power Supply Agreement commits WKP to pay a price high enough to motivate Cominco to invest in conservation, but neither that agreement nor the Long Term Firm Power Supply Agreement secures WKP's right of access to any of that firm power at any price ahead of the rights of any others in the market.

5.4.3 Least Cost Integrated Resource Planning ("LCIRP")

WKP was directed by the Commission, on page 19 of its December 20, 1990 Decision regarding WKP revenue requirements, to fully adopt LCIRP. Practically speaking, LCIRP identifies the least cost development sequence of new power resources, including both supply and conservation measures. The sequence is also determined by relative advantages

in terms of reliability of supply and environmental impact. This information is an essential ingredient in the Commission's understanding of the long-term consequences of the two new Cominco supply agreements.

In this regard, WKP provides the Commission a "Quarterly Report on Resources". The report for the third quarter of 1991 was filed as Exhibit 21 in this proceeding. That report contains brief updates on the various components of the WKP long-term power resource plan. Many of those components, including the new Cominco contracts are portrayed graphically in Exhibit 34 - "Resource Strategy Brilliant and Waneta". Notable omissions in that portrayal are Power Smart and Cominco conservation.

WKP was asked to provide a graphic illustration of its least cost integrated resource plan to the year 2005 and to include on that illustration the levelized unit cost in cents per kW.h of each of the resources in that plan. The plan was expected to include all the resources shown in Exhibit 34 plus Power Smart and power derived from conservation at Cominco.

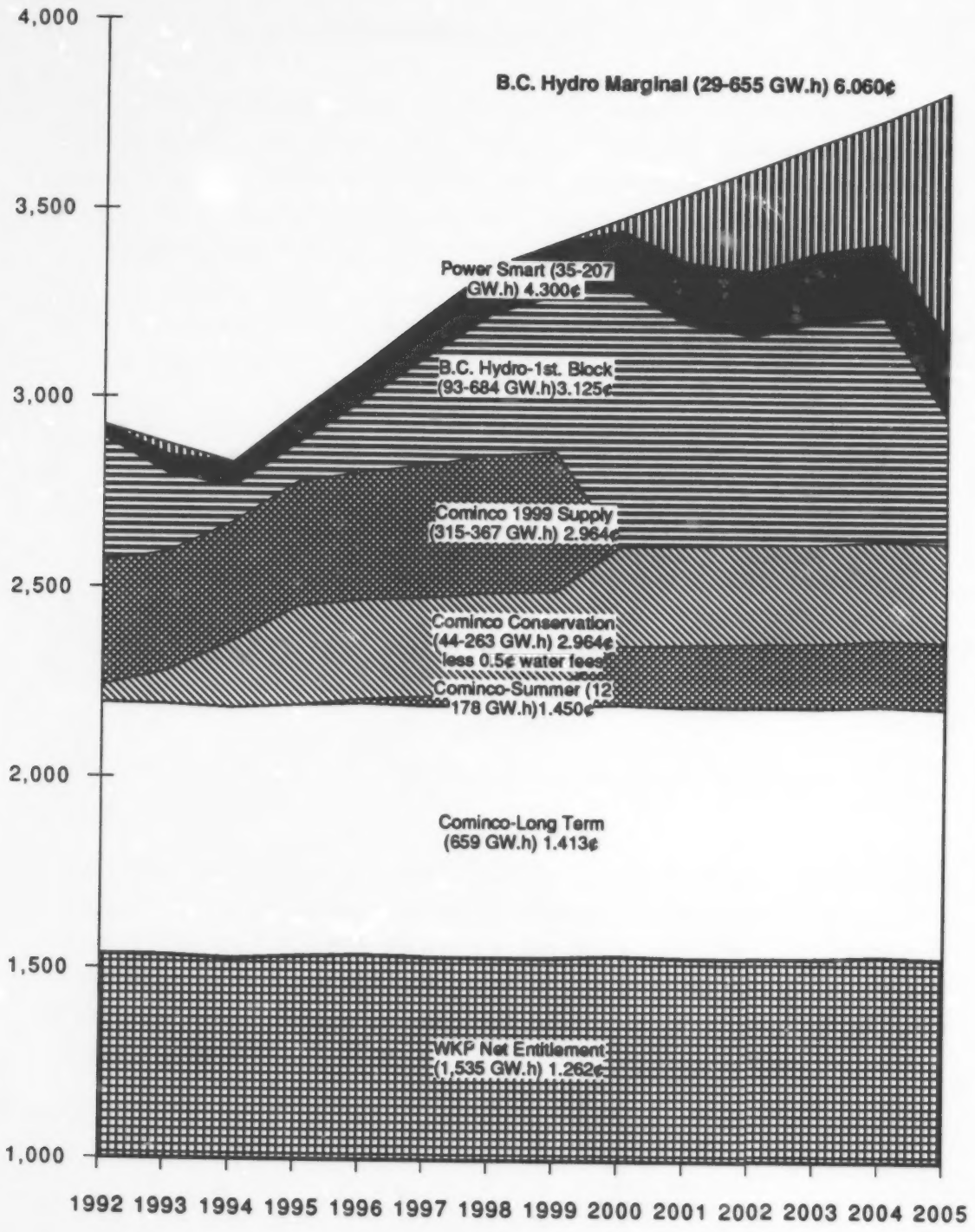
WKP responded following the hearing with an illustration of its planning scenario "1C", that includes both the new Cominco contracts and the new B.C. Hydro contracts, together with levelized unit costs. WKP also provided information as to the amount of power currently anticipated from its Power Smart demand side management program. WKP provided, in Exhibit 34A, preliminary information regarding the levelized unit costs of its alternative resources:

" B.C. Hydro Marginal Purchases		83 mills
Brilliant Expansion	240 MW	106 mills
	120 MW	76 mills
Waneta Expansion	380 MW	103 mills
Woodwaste		92 mills
Composite DSM (1990 estimate)		43 mills"

Even though WKP ascribes to LCIRP (T. 385), the utility stated, however, that "at this point in time we do not have a Least Cost Plan." WKP indicated in its response that both the new Cominco contracts and the new B.C. Hydro contracts need to be in place so that least cost planning can then be done.

From the above information and Exhibit 33, wherein the conservation potential at Cominco is currently estimated at about 30 aaMW, an alternative load/resource balance can be approximated that demonstrates the importance of DSM in the resource mix (see illustration at 5.4.3.1). This alternative least cost integrated resource plan demonstrates the significance of energy conservation compared with the marginal cost of B.C. Hydro supply and the timing of long-term supply side alternatives. For example, without the Cominco conservation resource, under the assumption of 30 aaMW, Brilliant expansion could be needed to be in service by 1996, but could be postponed at least three years with Cominco energy conservation. The identification and achievement of the economically feasible conservation potential at the Cominco operations is a crucial element in WKP's resource planning.

WKP Alternative Energy Resource Mix (GW.h) and Levelized Costs Per kW.h



WKP "1C" with DSM MIX

Illustration 5.4.3.1

12/17/91

5.4.4 Cominco Summer Surplus

WKP is forecasting a significant usage of power that is surplus to Cominco's needs in the summer months. According to data in Exhibit 34C, WKP will begin relying upon these surpluses in 1996 and by the year 2000 will be utilizing this resource to the extent of 158 GW.h. The levelized cost of this power is identified as 14.5 mills per kW.h. Neither of the agreements provide firm access to this power at any price other than at market.

WKP described its intention to rely upon the availability of Cominco summer surpluses at T. 216 and T. 468:

> " MR. SIDDALL: A: It would certainly depend on what Cominco load scenario you were looking at. I mean obviously if Cominco had a total shut down no, we could not use all the surplus. Given our projections of the Cominco loads as we have them, West Kootenay can use all the surpluses except there are some summer surpluses in the early years that we cannot use.
>
> MR. SCARLETT: Q: In early years, but later on you believe that West Kootenay could probably even absorb those, assuming that Cominco keeps its basic main plant running as forecast.
>
> MR. SIDDALL: A: Given the load forecasts that we have, yes, we can use them."

The Commission is concerned that WKP is including in its resource planning a non-firm resource which will be offered to the highest bidder on the open market. Unless it can be secured at the price indicated, the power would need to come from B.C. Hydro at the levelized marginal rate of 60.6 mills per kW.h with the result that, in the year 2000, WKP's total power purchase expense would increase by approximately $7 million, or almost 40 percent.

5.5 Sharing of Benefits

While the Intervenors agreed that security of supply is vital, they were also in agreement that the arrangement with Cominco appeared somewhat one-sided. The Municipalities believe that an agreement should be reached (T. 632) but suggested that the arrangement should be judged on how well it meets WKP's long and short term needs, and whether it can be considered in all of the circumstances to be a fair and reasonable bargain (T. 619). Their test would be whether or not the agreements provide an appropriate sharing of the benefits.

Mr. Wallace summarized at T. 639:

> "Looking at cost benefits to Cominco, I suggest you find a different situation. When you view the cost benefits from Cominco's perspective, they would appear to be very attractive. Cominco gains the right to all power in excess of current contract levels to use the power in its operations to sell in British Columbia or to export whether or not its operations continue in their present form. Cominco receives $60 million and Cominco removes the debate on what happens after 2005. What Cominco had to do to obtain these benefits was agree to firm up power which it may or may not require. To the extent that there's a significant chance that Cominco will require power for the zinc expansion earlier than forecast, Cominco will be protected from significant loss by West Kootenay high rates then in effect.
>
> Summarizing then, while this agreement does benefit both parties it would appear that a disproportionate share of the benefits go to Cominco. The agreements would effectively phase out many of the benefits fought for by the intervenors in the early 1980's, supported by the Commission, and granted by the government in the Exemption Order. It may be time to do this in whole or in part but it cannot be done lightly and without protection for the community."

Ms. Vance states at T. 647 that the Commission ought not to consider in determining the public interest the need for Cominco to receive a windfall. At T. 662, she states that, if Cominco wants to get the rate a utility charges, then let it become a regulated utility, taking the burdens with the benefits.

The ECA, while agreeing that WKP requires firm power contracts, felt in the end that the proposed contracts should not be approved as WKP did not negotiate in such a way as to secure the best possible deal for its customers and because its assumptions about Cominco's present and future circumstances are unrealistic (T. 680).

6.0 FUTURE CONSIDERATIONS

At T. 639, Mr. Wallace is most concerned about what he terms "future concessions" noting that:

> "CSOSPA was silent on the cost or availability of power after 2005, leaving the issue of West Kootenay's rights and rates open to argument at that time. In the new agreement West Kootenay acknowledges it has no rights after 2005, other than to purchase power at market, if an agreement can be reached. And that at least provides some benefit to Cominco in terms of clarification."

His summary at T. 640 includes the following:

> "The bottom line of the municipal intervenors is that this Commission should protect the residual power and keep it available in this community and in the service area should the disaster situation evolve. Second, the Commission should do what it can to clarify now the costs with respect to Brilliant and Waneta expansion, costs which we would submit should be on a historic-cost basis. There is no point in leaving that matter out alone for future discussion and future reference."

Ms. Vance is also concerned about the possible future arising from the Agreements: At T. 663:

> "Now, in the course of my cross-examination of West Kootenay Power witnesses at pages 78 and 79 of the transcript we considered the possibility that if Cominco had any operations there were not interdependent on others, Cominco, or its parent corporation might find it cheaper just to shut that one down, and the Kimberley mines could serve as one example, and to sell, just sell the power to West Kootenay Power at the same price obtaining from the 1999 contract Or with the Exemption Order framed in the terms that Cominco seeks, the company could just act as an unregulated utility and sell to the highest bidder,
>
> So that the contracts as they're presently framed and the Exemption Order as it's presently sought could end up being most detrimental to Trail and the region, although good for Cominco shareholders. I submit that the contracts should be altered if this arrangement is approved so that energy freed up through the shutdown of operations, now and I would distinguish that from demand side management initiatives or anything else, but just a simple decision, a business decision to close something down because it's more profitable to simply sell the power that that operation uses, I'd suggest that that type of energy freed up should be sold to West Kootenay Power at the same rate as in the long-term contract and alternatively I think that this could be handled in a new Exemption Order, that it wouldn't, that that could

simply preclude the section of the contracts which speak of anything goes with power over the 990 gigawatt hours could be rendered nugatory."

Alternatively, she stated the Commission could approve the Cominco contracts but calculate the money lost from foregoing back-up and then transfer this loss to the shareholders (T. 674).

Mr. Scarlett felt that the approval of these contracts cannot significantly extend Cominco's lifetime in Trail (T. 691) and that a condition of the Exemption Order should be that Cominco not be selling more than half of its power generation without losing its right to an exemption (T. 700). In addition, he believed that a condition should guarantee WKP's right of first refusal to any Cominco surplus energy at terms based on paragraphs I, J, K, L and Schedule 1 of the CSOSPA, and that Condition 5 of the draft Exemption Order (Exhibit 24) should be struck out.

On behalf of WKP, Mr. Macintosh agreed at T. 591 that the topic of the principles of valuation for compensation at the Brilliant dam could be addressed as the subject of amendments pursuant to an Exemption Order.

Mr. Johnson, in reply for Cominco at T. 722, said that, although there was some suggestion in argument that because of history, WKP customers had some special rights to power produced at the Cominco dams, those rights were resolved back in the early '80's. "Out of that came the Sale of Surplus Power Agreement, the right to firm power extended only to 1990. and we're now left with CSOSPA beyond that."

On the suggestions of inserting in the contract or Exemption Order, rights of first refusal or arrangements regarding Brilliant and Waneta, he submitted that they aren't in the contracts, which should not be modified, and that the Exemption Order is not a matter being dealt with in the hearing. The Commission concurs with Mr. Johnson and believes that these as well as other matters will be taken into consideration by the Minister in the consideration of the Exemption Order.

7.0 DECISION

The Commission's statutory duty is to decide whether the contracts are contrary to the public interest. Dependent on the terms of the Exemption Order, to be issued by the Minister of Energy, Mines and Petroleum Resources, the Commission concludes that acceptance of the contracts for filing is consistent with the public interest. However, after analyzing the two contracts, and examining the evidence presented at the Hearing, the Commission concludes that causing the contracts to become operational would be inconsistent with directives contained in the 1982 Exemption Order (paragraph 1(b)(iii) and (iv) in particular), and, hence, would then not be in the public interest at this time.

The Commission concludes that certain elements of the arrangement between Cominco and WKP may not have been agreed to if circumstances were different. Notably, if back-up service were available from B.C. Hydro at an attractive price, it would have enabled WKP to take advantage of the more favourable pricing structure under CSOSPA. This would also have satisfied their requirement to firm up an energy supply. Nonetheless, taking into consideration the realities of the present circumstances of WKP, the Commission did not hear compelling evidence to demonstrate that the contracts are not in the public interest or that WKP could have negotiated a more favourable arrangement short of lodging a formal complaint against B.C. Hydro with the Commission. Even then the outcome would not necessarily have been different from the negotiated settlement.

However, the Energy Supply Contracts are not yet operational. Cominco has applied for an amendment to the Exemption Order which, if granted would make the Exemption Order and the Energy Supply Contracts complementary. The outcome of that application has still to be determined. The Minister may accept, reject or vary the terms proposed by Cominco in accordance with the jurisdiction set out in Section 27 of the Act. If there is any inconsistency between the contracts and the Exemption Order, then any interested party, or the Commission on its own motion, could initiate an application to reconsider this decision.

The matter of power surplus to the combined requirements of WKP and the Cominco industrial load is a major issue. Under the present CSOSPA agreement WKP has the right of first refusal on all surplus power at the price set out in CSOSPA for use anywhere in its service area. This right has a value to the customers of WKP and is not present in the new contracts. This leaves the matter of the use or disposal of surplus power to the discretion of Cominco subject to Ministerial approval and Provincial and Federal laws. It is beyond the Commission's jurisdiction to anticipate government policy with respect to matters such as the future resale of Cominco's power entitlement outside of the service area of WKP.

Uncertainties surrounding the independence of WKP as a public utility with a secure source of energy supply, will not be resolved without development of an integrated plan for generation and allocation of the energy resources in this area. The alternative is long-term firm supplies from other sources sufficient to meet the needs of WKP's customers. This may involve setting whatever compensation for the Cominco dams that may be appropriate and other significant matters of consequence raised in this Decision and raised during the course of the hearing.

The Commission has considered the representatives made with respect to costs and the representations made and directs that the Commission costs be shared equally by WKP and Cominco.

DATED at the City of Vancouver, in the Province of British Columbia, this 18th day of December, 1991.

J.D.V. Newlands, Deputy Chairman
and Chairman of the Division

N. Martin, Commissioner

K.L. Hall, Commissioner